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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 792

EDWARD D. LOUGHMAN, as Receiver of The Pelham National Bank, Pelham, New York,
Plaintiff,

against

TOWN OF PELHAM, Westchester County, New York,
Petitioner and Third-Party Plaintiff,

against

THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD.,
Respondent and Third-Party Defendant.

BRIEF IN BEHALF OF RESPONDENT AND THIRD-PARTY DEFENDANT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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APPEAL PRINTING CO., INC., 180 CEDAR ST., NEW YORK, WO 2-2242

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POINT ONE

The Circuit Court of Appeals correctly followed and applied the law of the State of New York as established by applicable decisions of the New York courts, and as subsequently embodied in New York legislation.

No claim of negligence, misfeasance, or nonfeasance has ever been asserted against either Supervisor Mc-

Cormick or his successor Supervisor McBride. The District Court so held (fol. 130). The Circuit Court of Appeals did not dispute the finding. Upon that basis the argument proceeded in both the courts below, and must continue here.

No statute or regulation imposed a personal liability upon Supervisor McCormick for the loss of town funds through the failure of a bank designated by the town board pursuant to statute as a depositary of town funds, where the supervisor himself was concededly free from fault.

The so-called "rule of strict liability" upon which the petitioner relies, finds its basis in judicial legislation contained in decisions such as *Tillinghast* v. *Merrill*, 151 N. Y. 135 and *Yawger* v. *American Surety Co.*, 212 N. Y. 292.

In the absence of a statute book in which the words of the rule appear, from which the extent of the supervisor's liability might be determined by familiar principles of statutory construction, the scope of the rule must be considered as expounded by the court decisions in which alone it is to be found.

A study of these decisions shows clearly that the rule of strict liability does not extend to a loss caused by the insolvency of a depositary, where the supervisor had no power to designate the depositary, and did not in fact designate such depositary.

Tillinghast v. *Merrill, supra, Yawger* v. *American Surety Co., supra,* and *Village of Bath* v. *McBride,* 219 N. Y. 92, relied upon by the petitioner, dealt with situations where the statute gave the fiscal officer the exclusive right to designate a depositary, and the depositary whose insolvency caused the loss was actually selected by the fiscal officer held liable. In none of those cases was the defaulting depositary designated pursuant to statute by

the municipal governing board, as was the case in the suit at bar.

In *Tillinghast* v. *Merrill*, Supervisor Merrill, of the town of Stockbridge, deposited public moneys with a firm of private bankers to his credit as supervisor. The banking firm failed and the money was totally lost. The trial judge found that Merrill acted in good faith and without negligence in all that he did. The action was brought by the county treasurer to recover the money from Merrill and his bondsman upon the theory that Merrill, upon receiving the money, became the debtor of the county, and that the deposit of the money was at his own risk. It was held that Merrill and his surety were liable.

At the time of the *Tillinghast* case, the statute, differing from the Town Law of the State of New York as it existed in 1931, 1932 and 1933, when the deposits were made, contained no provision for the designation of the depositary by the town board. There was no statute which authorized or permitted the town board of the town of Stockbridge to designate the depositary of public funds, or which directed or controlled Merrill in his method of safeguarding the moneys committed to his charge. However spotless Merrill's personal integrity, it was the undeniable fact that the loss occurred through his mistaken choice of a depositary.

The inapplicability of the holding and reasoning of the *Tillinghast* case to the facts in the case at bar, can best be shown by quotation from the opinion of the Court of Appeals at page 142 as follows:

> "As before intimated, we must consider and decide this question upon general principles and in the light of public policy.

In the case of an officer disbursing the public moneys much may be said in favor of limiting his liability where he acts in good faith and without negligence, and a strong argument can be framed against the great injustice of compelling him to respond for money stolen or lost while he is in the exercise of the highest degree of care and engaged in the conscientious discharge of duty. When considering this side of the case it shocks the sense of justice that the public official should be held to any greater liability than the old rule of the common law which exacted proof of misconduct or neglect.

It is at this point, however, that the question of public policy presents, and it may well be asked whether it is not wiser to subject the custodian of the public moneys to the strictest liability, rather than open the door for the perpetration of fraud in numberless ways impossible of detection, thereby placing in jeopardy the enormous amount of the public funds constantly passing through the hands of disbursing agents.

Without regard to decisions outside of our own jurisdiction, we think the weight of the argument, treating this as an original question, is in favor of the rule of strict liability which requires a public official to assume all risks of loss and imposes upon him the duty to account as a debtor for the funds in his custody.

We do not wish to be understood as establishing a rule of absolute liability in any event. The United States Supreme Court, in *United States* v. *Thomas* (15 Wallace, 337), held the surveyor of customs for the port of Nashville, Tennessee, and depositary of public money at that place, not liable when prevented from responding by the act of God or the public enemy.

If that state of facts is hereafter presented to this court it will doubtless be carefully considered

> whether it does not present a proper exception to the general rule."

Prevention of fraud was the basis for the rule in *Tillinghast* v. *Merrill*. As was pointed out in the language quoted, to relieve the custodian of public funds from the strictest liability, would open the door for the perpetration of fraud in numberless ways impossible of detection, thereby placing in jeopardy the enormous amount of public funds constantly passing through the hands of disbursing agents.

In our situation, however, no possible public policy or useful purpose could be served by holding the supervisor liable. Supervisor McCormick did not select the depositary which lost the funds, and had no right or power to do so. The town board designated the depositary, as the statute directed it should. If McCormick had deposited the moneys elsewhere, he would have been committing a violation of the law,—though the result might have been to preserve the funds. In no sense whatsoever was he the custodian of the funds while in the possession of the depositary named by the town board. The responsibility in this respect was placed on the town board, which had the statutory duty of designating the depositary, and which in fact performed this duty.

While Supervisor McCormick was a member of the town board and was able to cast one vote, there were five other members, each of whom was also entitled to cast a vote. If some statute had provided, public policy might perhaps have been served by imposing on all of the members of the town board an absolute joint and several liability in case of the insolvency of the depositary. No possible purpose could be served by holding only one

member of the town board to such liability, while letting the other members go scot free, thereby making the supervisor a "whipping boy" for the entire group.

The second case of the series relied upon by the petitioner is *Yawger* v. *American Surety Co., supra,* which involved the supervisor of the town of Cicero, Illinois. The facts were similar to those in *Tillinghast* v. *Merrill,* and the result was the same. In its essence, however, it adjudicates the law of the state of Illinois and not the law of the state of New York.

The third case relied upon by the petitioner is *Village of Bath* v. *McBride, supra.* This is an interesting case, and we ask the Court to read carefully, not only the opinion of the Court of Appeals, but also the opinion of the Appellate Division reported in 163 App. Div. 714.

The action was brought by the village of Bath to recover upon the official bond of McBride, the village treasurer, for moneys lost through the failure and bankruptcy of the George W. Hallock Bank. The trial court found that McBride had "custody and possession" of the funds. Judgment was rendered in favor of the village for the amount of village moneys lost, with interest. The judgment was reversed by the Appellate Division, and the finding of the trial court as to the custody and possession of the funds by McBride was disapproved, and an affirmative finding was made that the trustees of the village of Bath had, by resolution, designated the George W. Hallock Bank as depositary of the village funds. The Appellate Division held that such designation took the case out of the rule of strict liability laid down in *Tillinghast* v. *Merrill.* The Appellate Division said at page 717:

> "Liability herein has been predicated upon a line of authorities illustrated by *Tillinghast* v. *Mer-*

> *rill* (151 N. Y. 135). It was there held that the supervisor of a town was, by virtue of his office, the insurer of the moneys in his hands. But an examination of that and similar authorities discloses that such strict rule of liability has its foundation in the fact that such officer is made by statute the depositary of the public moneys. In the *Tillinghast Case* (*supra*) the distinction in the rule of liability, where the depositary is fixed by statute, is pointed out in the reference therein to *United States* v. *Thomas* (15 Wall. 337). It would not apparently admit of question but that had the village board of Bath designated this Hallock Bank, prior to its failure, no liability would or could exist against appellants, and such would seem to be the just and equitable rule of liability to be applied."

The Court of Appeals indicated no disagreement with the rule of law so stated. The sole ground given by the Court of Appeals for reversing the Appellate Division and sustaining the judgment of the trial term in favor of the village, was that the board of trustees had not made the designation claimed, and that its resolution accepting the bank's offer to pay interest in case village funds were deposited there, was not a substantial equivalent. The Court of Appeals said:

> "I think there was no evidence to support the finding of the Appellate Division and that we must reverse the judgment appealed from" (p. 96).

> "Assuming that the board of trustees had power to designate a depositary of village money and power to require the treasurer to deposit the money according to such designation, they did not exercise that power" (p. 97).

> "My conclusion is that the judgment appealed from should be reversed and the judgment of the trial court reinstated, with costs. This conclusion renders it unnecessary to consider the other questions raised by the appellant" (p. 97).

In the recent case of *Matter of Bird* v. *McGoldrick*, 277 N. Y. 492, also relied upon by the petitioner, the Court of Appeals was asked to apply the rule of *Tillinghast* v. *Merrill* to the clerk of the municipal court of the city of New York, borough of Manhattan, third district, for moneys misappropriated by one of his deputies. The Court of Appeals refused to do so, holding that the liability of the clerk rested in the clear mandate of the statute which made him * * *

> "* * * responsible for, the general conduct of business of his office and for the faithful discharge of the duties of the deputy and assistant clerks and other officers connected with the court" (p. 500).

Commenting upon the *Tillinghast* case, Chief Judge Lehman said at page 498:

> "From the time when the courts were first called upon to determine the measure of liability of a public official for moneys in his custody, judges have recognized that choice of any rule must depend upon the weight to be given conflicting considerations of public policy. The dissent of Sir JOHN HOLT from the early decision in *Lane* v. *Cotton and Frankland* (*supra*), that a postmaster is not responsible for money stolen or lost without his fault, was based upon the ground that a sound public policy dictated the rule of strict liability in order to prevent frauds. The choice made by this court of the rule of strict liability in *Tillinghast* v. *Merrill*,

supra, was in large degree based upon similar views of public policy."

The Court continued at page 499:

> "There can be no doubt that the rule of a strict liability for moneys *received* by a public official is in accord with the great weight of authority in this country. Indeed, the decisions, both Federal and State, are almost uniform. Many are cited in the opinion in *Tillinghast* v. *Merrill* (*supra*), and it would serve no useful purpose to add later citations which also support the rule. Even so, a careful analysis of recent decisions seems to indicate a growing sense of the injustice of imposing liability upon a public official without exacting proof of misconduct or negligence on his part, especially where loss is due solely to the dereliction of a subordinate who is not chosen by the official held liable. Though this court has reiterated the rule of a public officer's strict and almost absolute liability for public moneys received by virtue of his office (*Yawger* v. *American Surety Co.,* 212 N. Y. 292; *Trustees of Village of Bath* v. *McBride,* 219 N. Y. 92; *City of New York* v. *Fox,* 232 N. Y. 167), yet it may be noticed that only in the last cited case did it appear that the loss was due to the dereliction of a subordinate and there the court pointed out that the subordinate was chosen by the official held liable."

Indeed, Chief Judge Lehman indicated that, except for the express language of the statute, the decision might well have gone otherwise, saying at page 499:

> "It is for the Legislature, not the courts, to change or limit the rule if such change seems wise. Even so, this court might hesitate to extend a rule (formulated by this court on grounds of public policy) which imposes upon public officers strict

> liability for loss of public moneys *received*, so that such liability would include also loss caused to the public by failure of a subordinate to *collect* public moneys."

To similar effect is *City of New York* v. *Fox*, 232 N. Y. 167, where the warden of the workhouse on Blackwell's Island was held liable for money embezzled by one of his subordinates, not because of the rule in *Tillinghast* v. *Merrill*—for the Court of Appeals expressly refused to apply it,—but on the familiar basis of *respondeat superior*.

As opposed to those decisions, in every case in which a New York court has been called upon to consider the precise point involved in the case at bar, the court has held, or at least indicated, that the rule of *Tillinghast* v. *Merrill* did not apply.

> *City of Newburgh* v. *Dickey*, 164 App. Div. 791;
> *People ex rel. Glens Falls Trust Co.* v. *Reoux*, 60 Misc. 139, aff'd 128 App. Div. 933;
> *Village of Bath* v. *McBride*, *supra*.

City of Newburgh v. *Dickey*, *supra*, was a submission of a controversy to the Appellate Division, Second Department, upon an agreed statement of facts. The city charter of the city of Newburgh contained no specific provision empowering either the city council or the city treasurer, or any other board or official, to select a depositary. It was implied from general provisions, and the case proceeded on the assumption, that such power was vested in the city council. The city council passed a resolution designating a certain bank as the depositary of the funds of the city and of the several departments thereof, and directing the city treasurer to deposit the funds of the city in that bank. The city treasurer refused to

comply with the direction, taking the position that he was the usual or legal custodian of the funds of the city by virtue of his office, and that he had the right to determine where he should deposit the money. He laid stress upon the fact that he was required by the charter to give a bond to faithfully discharge the duties of his office and to pay over all moneys received by him, and the city treasurer argued that, since he was required to give a bond and was thus responsible as insurer of the deposits, the fair intendment was that he should select the depositary.

The Appellate Division sustained the position of the city council, and granted the mandamus requiring the city treasurer to deposit the funds in the depositary designated by the city council.

After referring to *Tillinghast* v. *Merrill*, the Appellate Division rejected the treasurer's contention that he was an insurer of deposits under the circumstances presented, saying at page 794:

> "But in that case the court said that they do not wish to be understood as establishing a rule of absolute liability in any event. Neither the requirement of this bond nor the general rule would extend to moneys received by the official while those moneys were held by a depositary designated by another body or officer of the city in accord with law and exclusive of any power cast upon him. (Dillon Mun. Corp. (5th Ed.) 764, citing *Perley* v. *Muskegon County*, 32 Mich. 132. See, too, Mech. Pub. Off. 610; *Hobbs* v. *United States*, 17 U. S. Ct. Cl. 189). The condition of the bond would be met if he discharged his duty with respect to the moneys when not in the exclusive charge of the depositary named by the city council."

People ex rel. Glens Falls Trust Co. v. *Reoux, supra,* was a mandamus proceeding to compel the county treasurer of Warren County to deposit county funds in a trust company designated by the county board of supervisors. It appeared that the county treasurer had previously designated a firm of private bankers as depositary, and had deposited all of the public funds with them. The application was denied. Mr. Justice Spencer said at page 142:

> "By section 145 of the County Law, the county treasurer is not released from liability to the county for moneys deposited, but the default of the depositary is deemed the default of the treasurer. If the contention prevail that the treasurer submit to the directions of the board of supervisors in the selection of a depositary, then the treasurer is responsible for the default of one he did not select. It cannot be supposed that the law contemplated any such result."

The same views were expressed by the Appellate Division in *Village of Bath* v. *McBride, supra.* Although the judgment was reversed by the Court of Appeals on a factual point, it seems to us significant that the Court of Appeals allowed the rule laid down by the Appellate Division to pass unchallenged. For if the judges of the Court of Appeals had believed that the Appellate Division had announced an incorrect and unsound principle of law, it is certain that they would not have allowed the holding to stand unquestioned but would, at the very least, have indicated disagreement with it.

We have found no authority in the state of New York contrary to the views expressed in the three cases last cited. Counsel for the petitioner has also referred to

none, and Circuit Judge Swan, in his dissenting opinion, referred to none.

In other jurisdictions, whenever the precise question arose, the fiscal officer has uniformly been held not liable where someone else was required to, and did, designate the depositary, the only exceptions being where he knew at the time the deposits were made that the bank was unsafe, or ignored a condition expressly attached to the designation, or was negligent in other particulars,—exceptions which were absent in the case at bar.

Perley v. *Muskegon County*, 32 Mich. 132;
City of Scranton v. *Aetna Casualty and Surety Co.*, 11 Fed. Supp. 986, aff'd 94 Fed. 2nd 941;
Ex parte Morris, 9 Wall. 605;
Miller v. *Batson*, 160 Miss. 642;
Board of Education v. *Nelson*, 33 N. Dak. 462;
Hinton v. *State*, 57 Okla. 777;
State ex rel. Adair County v. *McCloud*, 64 Okla. 126;
Grant County v. *Soucek*, 128 Okla. 151;
Edgerton Independent Consolidated School District v. *Volz*, 50 S. Dak. 107;
Board of Education v. *Whisman*, 56 S. Dak. 472;
Edwards v. *Logan County*, 244 Ky. 296;
Stephens v. *Ludlow*, 159 Ky. 729;
Montgomery v. *State*, 97 Miss. 292;
State v. *Carney*, 208 Ia. 133;
Mordt v. *Robinson*, 116 Fla. 544;
Overton County v. *Copeland*, 96 Tenn. 296;
Hobbs v. *United States*, 17 Ct. Cl. 189;
Chandler v. *Britton*, 197 S. Car. 303;
City of Livingston v. *Woods*, 20 Mont. 91;

American Surety Co. v. *City of Thomasville,* 73 Fed. 2nd 584, cert. denied 294 U. S. 721;
People ex rel. Nelson v. *Peoples' State Bank,* 354 Ill. 519.

See also the following cases where the court in stating or imposing the general rule of strict liability, expressly noted as an exception the case where the fiscal officer was required to deposit funds in a depositary selected by someone else.

State v. *Bobleter,* 83 Minn. 479;
City of Bessemer v. *Re,* 282 Mich. 180;
Bragg City Special Road Dist. v. *Johnson,* 323 Mo. 990;
Village of Hampton v. *Gausman,* 136 Neb. 550;
Knox County v. *Cook,* 126 Neb. 477;
Bunker v. *United States Fidelity & Guaranty Co.* (Utah), 72 Fed. 2nd 899.

Commenting on such a situation, the court, in *Perley* v. *Muskegon County, supra,* said:

> "If an officer is required or authorized by law to make deposits in any particular place or with any particular person, he is usually, if not universally, protected from any further responsibility, so long as he leaves it there, and is not a guarantor of the safety of the deposit."

Again, in *Hobbs* v. *United States, supra,* Judge Schofield said at page 196:

> "The only fault or negligence complained of is the fact that he deposited the money in a bank designated by the Secretary as a depositary of

> public money, when he might have deposited it in the Treasury. That in itself was not a fault. It was strictly according to law. The Act March 3, 1857 (11 Stat. R. 243) authorized and required him to deposit in the Treasury or some public depositary. The law does not provide that this compulsory choice should be at his peril. If he made it in good faith, without knowledge or suspicion of the bank's insolvency, and without the expectation of gain or other private motive, he ought not to stand the loss."

To the same effect are the textbook writers:

> *Dillon on Municipal Corporations* (5th Ed.) Sec. 434;
> *Mechem on Public Officers*, page 610.

Judge Dillon, in a footnote appearing at page 764, says:

> "If, however, the officer is required or authorized by law to deposit the money in a designated depositary, he is usually protected from further responsibility and is not a guarantor of the safety of the deposit."

From the foregoing unbroken array of authority, it clearly appears that the decision of the Circuit Court of Appeals in the case at bar accorded with the overwhelming weight of authority on this point.

Subsequent New York legislation has approved the law laid down in *City of Newburgh* v. *Dickey*, and has limited the rule of *Tillinghast* v. *Merrill* to the facts there presented, and has expressly provided that the rule of absolute liability should not be extended to a case where

the depositary was required by statute to be selected by the town board.

Nearly a year before the Pelham National Bank closed on March 3, 1933, it had already been provided by Sections 29-(2) and 64-(1) of the New Town Law (Chapter 634 of the Laws of 1932), enacted April 8, 1932, that the designation of a bank or trust company by the town board as a depositary of town funds, and the deposit of the moneys in the depositary so designated, would relieve the supervisor and his surety in case of loss due to the default of the depositary so designated.

As pointed out by the Circuit Court of Appeals, this was, "obviously designed as a codification of previous piecemeal legislation, and was enacted with the intention of embodying in one comprehensive statute a legislative scheme pertaining to political subdivisions of the State, many of which had not been covered by much of the earlier scattered legislation" (R. p. 60).

To be sure these sections were contained in the New Town Law which did not become effective generally until January 1, 1934. But the announcement of the public policy as found in these two sections, 29 and 64, was nonetheless clear and effective from and after the time of the adoption of the legislation in 1932.

Furthermore, as if to remove any doubt about it, the legislature, by the 1937 amendment to Section 64-(1) (Chapter 468 Laws 1937) expressly gave these provisions retroactive effect saying:

> "All acts done prior to the effective date of this section which would have been valid hereunder are hereby validated."

The petitioner argues that the enactment of these provisions of the New Town Law indicated a recognition on

the part of the legislature that the rule of absolute liability existed even where the depositary was selected by the town board, and showed a desire on the part of the legislature to change the rule.

We disagree with this contention entirely.

It will not be assumed that the legislature was insensate to the gross inequity pointed out in *City of Newburgh* v. *Dickey, People ex rel. Glens Falls Trust Co.* v. *Reoux,* and *Matter of Bird* v. *McGoldrick,* of holding a fiscal officer liable as insurer upon the default of a bank selected by a municipal body or officer over whom he had no control. It cannot be presumed that the legislature believed that the public policy of the State of New York demanded that a town supervisor be held liable under such conditions. The 1937 amendment showed conclusively that the legislature was impressed by such considerations and sought to relieve the supervisor as far as it had power to do so, even though it meant a loss to the town.

It seems clear to us that, in expressly providing that the supervisor should not be liable in case of loss of town funds due to the default of the depositary designated by the town board, the legislature evidenced its recognition that this was the existing public policy of the state, and announced its purpose that such public policy should be continued.

Even if it be true, as petitioner argues and as Judge Conger suggested, that the legislature had no constitutional power to give Sections 29 and 64 retroactive effect if the result would be to shift an existing loss from the supervisor to the town, (cf. *State ex rel. Jackson* v. *Middleton,* 215 Ind. 219, where such legislation was held constitutional), the legislation is not open to attack if it is

construed—as we think it should be construed—as a pronouncement that even before the enactment of the New Town Law the supervisor was no longer liable where the town board designated the depositary. If there is force to petitioner's constitutional point, the 1937 amendment must be construed in such manner as to render it effective and valid.

It is respectfully submitted that the Circuit Court of Appeals correctly held that *Tillinghast* v. *Merrill* had no application here; that the case is governed by the rule of law laid down in *City of Newburgh* v. *Dickey* and by the Appellate Division in *Village of Bath* v. *McBride;* that the principles of public policy applicable to the present situation require that no liability be placed upon the town supervisor for discharging his duty by depositing funds in the depositary selected by the town board pursuant to statute.

In effect, the Town of Pelham is seeking to reject the New York law as announced in *City of Newburgh* v. *Dickey,* and confirmed by subsequent legislation, and to extend the principle of *Tillinghast* v. *Merrill* to a field which has never been brought within the ambit of the decision, and which the New York legislature has expressly placed beyond its scope.

POINT TWO

The Circuit Court of Appeals followed and correctly applied the legislative policy of the New York Town Law defining the extent of the supervisor's duty and liability to the town.

Both under Section 100 of the Old Town Law (Chapter 63 Laws of 1909) and under Section 25 of the New Town Law (Chapter 634 Laws of 1932) as well as at the present moment, the obligation of the supervisor is expressed in identical language, viz.:

> "That he will well and truly keep, pay over and account for all moneys and property, including the local school fund, if any, belonging to his town and coming into his hands as such supervisor."

Similarly during all of these years it was provided by Section 11 of the Public Officers Law, and is still provided by such statute that his official undertaking,

> "shall be to the effect that he will faithfully discharge the duties of his office and promptly account for and pay over all moneys or property received by him as such officer, in accordance with law, or in default thereof, that the parties executing such undertaking will pay all damages, costs and expenses resulting from such default, not exceeding a sum, if any, specified in such undertaking."

It is significant that when, in 1932, there was included in the New Town Law the following clause, appearing in Sections 29-(2) and 64-(1), viz.:

> "Such designation and deposit of the moneys shall release the supervisor and his sureties from

> any liability for loss of such moneys by reason of the default or insolvency of any such depositary,"

the language of Section 11 of the Public Officers Law, and of the above quoted clause in the Town Law, remained unchanged.

It was stipulated (fol. 24) that Supervisor McCormick complied implicitly with this direction and at no time deposited any funds in any depositary other than those designated by the town board.

Accordingly, when Supervisor McCormick was required to "account for and pay over" the lost funds, he completely fulfilled his obligation by showing that he had deposited the money in the Pelham National Bank, a depositary designated by the town board. No further accounting was required. He could only be held liable for the loss, upon proof of negligence or other misconduct on his part.

This was the holding of the Circuit Court of Appeals, Third Circuit, in *City of Scranton* v. *Aetna Casualty and Surety Co.*, 11 Fed. Supp. 986, aff'd 94 Fed. 2nd 941, where the city treasurer was required to "make daily deposits of all moneys received by him in such banks or institutions as may be designated by" the city council. His official bond was conditioned that he should "pay over to the persons authorized by law to receive the city's money that may come into his hands during said term as provided by law."

The Third Circuit held that the city treasurer was not liable. Circuit Judge Buffington said:

> "As quoted above, the surety bond was to be released if the treasurer deposited the city money in city designated banks. This the treasurer did;

> consequently, the obligation of the surety was complied with."

To the same effect is the decision of the Fifth Circuit in *Fanning County, Texas* v. *New York Casualty Co.*, 131 Fed. 2nd 664.

The petitioner also stresses the language of the supervisor's official bond, and points out that the bond was in substantially the same form as Supervisor Merrill's bond in *Tillinghast* v. *Merrill*, and argues that for this reason the surety should have been held liable in the case at bar.

The petitioner overlooks the fact that this was also substantially the same form of bond which was involved in *City of Newburgh* v. *Dickey*, as to which the Appellate Division said at page 794:

> "Neither the requirement of this bond nor the general rule would extend to moneys received by the official while those moneys were held by a depositary designated by another body or officer of the city in accord with law and exclusive of any power cast upon him."

The petitioner also stresses Section 101 of the Old Town Law, carried over in Section 29-(6) of the New Town Law, which authorized (but did not direct) the supervisor to

> "purchase a surety bond of some solvent surety company, authorized to do business in the state of New York, securing to such supervisor the safety of town funds deposited by him in any bank or banking institution in this state, and indemnifying him against the loss thereof through the failure or insolvency of such bank or banking institution."

As to this argument, the Circuit Court of Appeals gave the conclusive answer as follows (p. 59):

> "Not only does this argument beg the question as to 'inconsistency,' but more important, it neglects the fact that there was good reason for retaining §101 after the enactment of §149-c, since the latter section did not apply to the Supervisors of many of the towns of the State. It is significant that when, subsequently, by the statute known as the New Town Law which became operative in 1934, Supervisors of all towns were relieved of liability for deposits in designated banks, §101 was expressly repealed."

We respectfully submit, therefore, that the decision of the Circuit Court of Appeals was in complete accordance with the express provisions of the New York statutes and of the policy found therein.

POINT THREE

The decision of the Circuit Court of Appeals did not destroy or in any way affect vested contract rights, or impair the obligation of the contract represented by the bond sued upon.

The petitioner's assertion that the Circuit Court of Appeals "gave essentially a retroactive effect to the later amendments of the New York Town Law" is refuted by the express language of both the District Court and the Circuit Court of Appeals.

Judge Conger rested his decision squarely on the language of Section 149-c of the Old Town Law added in 1916, which became applicable to the Town of Pelham

in March, 1931. After quoting this section, Judge Conger said (fol. 134):

> "By this amendment, the supervisor no longer had any discretion as to where the Town's money was to be deposited. The depositary was to be named by the Town Board. Can it be said that a supervisor who deposits money in a bank designated by the Town Board shall be held to the rule of strict accountability, if the bank fails and the Town loses money? I think not."

Referring to the retroactive amendment made by Chapter 468 of the Laws of 1937, Judge Conger said (fol. 146):

> "As for the amendment of 1937, I am a bit at a loss as to just how far it may be applied. I doubt very much that the amendment of 1937 can be held to reach back and validate an illegal ultra vires agreement after the rights of all the parties concerned had become fixed and vested."

Therefore, far from relying upon retroactive legislation, Judge Conger expressly rejected the argument, and rested his decision on legislation adopted in 1916.

The Circuit Court of Appeals adopted the same line of reasoning.

It is respectfully submitted, therefore, that no contract rights were impaired or destroyed by the decision of the courts below, and that both decisions were carefully limited to a determination of the scope of the obligation imposed on the town supervisor when he took office on January 1, 1932, and under his official bond written in December, 1931.

POINT FOUR

This Court recently denied certiorari in a case involving closely similar facts.

American Surety Co. v. *City of Thomasville,* 73 Fed. 2nd 584, cert. denied, 294 U. S. 721, was a decision of the Circuit Court of Appeals, Fifth Circuit, and involved the treasurer of the city of Thomasville, Georgia. Under the public act of legislature by which the city was created, the mayor and aldermen were empowered to elect a treasurer and other officials, and to "take their bonds, and prescribe their powers and duties." Pursuant to this authority, ordinances were passed providing for the treasurer's oath and bond "conditioned for the faithful discharge of his duty". Subsequent ordinances authorized the treasurer to divide deposits among the local banks, and designated three Thomasville banks as depositaries of city funds. In succession, all three banks failed, resulting in a substantial loss of city money. The Court found that the city treasurer did not know, or have any reason to believe that either bank was insolvent or in a failing condition.

The District Court held the treasurer liable, but the Fifth Circuit reversed.

Judge Sibley, reading for the Circuit Court of Appeals said at page 586:

> "In Georgia, as generally elsewhere, it is held that a public official intrusted with public moneys is bound to keep them safely at all events, and is not excused for losses unless perhaps when caused by the act of God or the public enemy. He is not a mere bailee answerable only for neglect. He

> cannot ordinarily lend the funds to a bank on general deposit, but is liable if they are thus lost. This was held of a county treasurer in *Lamb* v. *Dart,* 108 Ga. 602; of the bond commission of a city in *Wiley* v. *City of Sparta,* 154 Ga. 1; and of a county school superintendent in respect of school funds in *American Surety Co.* v. *Ne Smith,* 49 Ga. App. 40."

After pointing out that in the *Wiley* case and the *Ne Smith* case the fiscal officers were permitted to select their own depositaries while the Thomasville city treasurer was compelled to comply with the designation made by the city council, the Court concluded:

> "Under the agreed facts, the verdict directed was wrong. The loss ought to fall on the city whose council had full power over the treasurer and whose directions he was following, and not on him and his bond."

The parallel between that case and the case at bar is complete. In New York, as in Georgia, there exists the rule of strict liability, evidenced by decisions of the highest courts of the respective states. But there is an exception to that rule, illustrated in New York by *City of Newburgh* v. *Dickey,* and in Georgia by *American Surety Co.* v. *City of Thomasville,* where some one else is required by law to select the depositary. In such case, the fiscal officer is not liable where he complies with the direction.

This Court denied certiorari in the *Thomasville* case, and should likewise deny certiorari here.

POINT FIVE

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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